STATE OF MICHIGAN

IN THE SUPREME COURT

LACY HARTER and MIKE McCLELLAND, As Co-Personal Representatives of the Estate of KEGAN McCLELLAND, Deceased, and LACY HARTER, Individually and MIKE McCLELLAND, Individually,

Plaintiffs-Appellees,

-vs-

GRAND AERIE FRATERNAL ORDER OF EAGLES,

Defendant-Appellant,

-and-

MICHIGAN STATE AERIE FRATERNAL ORDER OF EAGLES, HOWELL AERIE #3607 FRATERNAL ORDER OF EAGLES, HARRIS SEPTIC TANK CLEANING & ALWAYS CLEAN PORTABLE TOILET, INC., DALE HARRIS, Individually and AMERICAN CONCRETE PRODUCTS, INC., Individually, and Jointly and Severally,

Defendants.

Supreme Court No. 126255

COA Docket No. 244689

LCt. No. 00-17892-NO

Hon. Daniel A. Burress

126255

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PLAINTIFFS-APPELLEES' RESPONSE IN OPPOSITION TO DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

APPENDIX

PROOF OF SERVICE

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Statutes, Court Rules and Other Authorities

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COUNTER-STATEMENT OF THE ISSUES

I. DID THE TRIAL JUDGE ABUSE HIS DISCRETION BY DEFAULTING THE GRAND AERIE AS TO LIABILITY WHERE IT PREJUDICED PLAINTIFFS BY REPEATEDLY FLOUTING THE COURT'S DISCOVERY ORDERS AND MADE A MOCKERY OUT OF THE FINAL SETTLEMENT CONFERENCE WHILE THE JURY SAT "TWIDDLING THEIR THUMBS" FOR THE BETTER PART OF TWO DAYS?

Plaintiffs-Appellees say, "No."

The Trial Court said, "No."

The Court of Appeals said, "No."

Defendant-Appellant says, "Yes."

II. A. DID THE TRIAL COURT AND THE COURT OF APPEALS CORRECTLY HOLD THAT THE GRAND AERIE CANNOT RE-LITIGATE LIABLITY AFTER THE DEFAULT WAS ENTERED?

Plaintiffs-Appellees say, "Yes."

The Trial Court said, "Yes."

The Court of Appeals said, "Yes."

Defendant-Appellant says, "No."

II. B. IF THIS ISSUE IS REVIEWED ON THE MERITS, DID THE TRIAL COURT PROPERLY DENY SUMMARY DISPOSITION?

Plaintiffs-Appellees say, "Yes."

The Trial Court said, "Yes."

The Court of Appeals said, "Yes."

Defendant-Appellant says, "No."

III. WAS THE HIGH/LOW AGREEMENT WITH HOWELL #3607 PROPERLY EXCLUDED FROM THE JURY

Plaintiffs-Appellees say, "Yes."

The Trial Court said, "Yes."

The Court of Appeals said, "Yes."

Defendant-Appellant says, "No."

IV. A. DID DEFENDANT PRESERVE THE CLAIM THAT THE HIGH/LOW AGREEMENT WITH HOWELL #3607 CAPPED THE GRAND AERIE'S DAMAGES?

Plaintiffs-Appellees say, "No."

The Trial Court did not answer this Question.

The Court of Appeals did not answer this Question.

Defendant-Appellant says, "Yes."

IV. B. DID THE COURT OF APPEALS PROPERLY RECOGNIZE THAT PLAINTIFFS' AMENDED COMPLAINT AGAINST THE GRAND AERIE ASSERTED DIRECT LIABILITY THEORIES THAT PRECLUDED THE GRAND AERIE'S RELEASE CLAIM?

Plaintiffs-Appellees say, "Yes."

The Trial Court did not consider this issue.

The Court of Appeals said, "Yes."

Defendant-Appellant says, "No."

V. DID THE COURT OF APPEALS PROPERLY AFFIRM DENIAL OF NEW TRIAL/REMITTITUR AND THE DENIAL OF A $300,000.00 SET OFF?

Plaintiffs-Appellees say, "Yes."

The Trial Court said, "Yes."

The Court of Appeals said, "Yes."

Defendant-Appellant says, "No."

VI. DID THE COURT OF APPEALS CORRECTLY RECOGNIZE THAT THE GRAND AERIE FAILED TO PRESERVE ITS OBJECTION TO THE CLOSING ARGUMENT AND "FAILED TO SHOW THAT THE POEM CAUSED ERROR REQUIRING REVERSAL?"

Plaintiffs-Appellees say, "Yes."

The Trial Court did not consider this issue.

The Court of Appeals said, "Yes."

Defendant-Appellant says, "No."

PLAINTIFFS' RESPONSE TO DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

Defendant Grand Aerie seeks leave to appeal asserting that this case involves legal principles of major significance to the State's jurisprudence, that the decision is clearly erroneous, will cause material injustice and conflicts with other decisions of this Court and the Court of Appeals. MCR 7.302(B)(3), (5). Carefully analyzed, the issues raised satisfy none of these grounds for granting leave or for any other Supreme Court relief. Rather, because this case involves a lawfirm that the defense bar perceives as being a target of this Court, the name of Geoffrey Fieger is repeated over and over again, as in a mantra, so as to invoke this Court's "perceived" animus.

Ignoring Judge O'Connell's concurrence "that the Grand Aerie's part in the negotiation fiasco warrants some sanctions," Defendant latches onto his "outrage at the majority's opinion" and calls it "genuine," while, at the same time, Defendant decries the majority's outrage at the tripartite misdeeds of Defendant Grand Aerie, its trial defense counsel, and its insurers as somehow "feigned and pretended" to deflect their "true, nefarious strategy."\

What "true, nefarious strategy" is appellate defense counsel talking about? Is he referring to the majority and the trial judge's "strategy" to uphold the rule of law and apply it evenhandedly to the powerful as well as the weak;, to assure that Kegan McClelland's family who will deal with this tragedy hour-by-hour, day-by-day for the rest of their lives can get the professional help they desperately need to endure the pain? Is he considering the majority's "nefarious strategy" of affirming based on settled law to give the injured some small measure of satisfaction that our legal system has done all that is within its authority to adjust their losses knowing still that they can never be made whole again?

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On the Grand Aerie's side, we have only a declaration of its own outrage that "this case is a total tragedy." Upon reading further, one realizes that the "total tragedy" from the Grand Aerie's perspective lies solely in its perceived injustice at the jury's verdict. It does not factor into the "total tragedy," the senselessly negligent death of Kegan, a toddler who did not live to see his family celebrate his third birthday.

The Grand Aerie seizes upon Judge O'Connell's remark that the majority's decision is an affront "to an otherwise stable area of law and the benevolent organizations it once protected." Judge O'Connell cites *Appleman on Insurance Law and Practice §10173*, but what that section actually says in its first sentence is the general rule, "The grand lodge of a fraternal organization cannot avoid responsibility for the acts of a subordinate lodge." The fact is, only recently have some courts expressed more willingness to excuse national fraternal organizations for the torts of their local branches. At bottom, liability depends on the facts and circumstances of each case. Here, both the trial court and the Court of Appeals have agreed that in defending the suit, the Grand Aerie, its attorneys and insurers acted in such a reprehensible way toward Plaintiffs and the court that they legitimately deprived themselves of a liability defense to present to a jury.

Like a prosecutor waving a victim's bloody shirt before a jury, appellate defense counsel becomes so wrapped up in wildly incanting Plaintiffs' lead counsel's name throughout the Application (no less than 30 times), that his vitriolic brief loses all perspective. Despite his now standard logorrheic purple prose aimed at Plaintiffs' lead counsel, this case was undeniably very cleanly tried by Plaintiffs. Defendant Grand Aerie finds itself stung by a seven figure verdict because of its own misconduct and pigheadedness, not because of any prejudicial conduct by Plaintiffs or their attorneys, and certainly not because of any legal error or palpable abuse of discretion by the able trial judge. The Verdict and Judgment

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reflects the enormity of the tragedy and the incredibly poor litigation choices made by the Grand Aerie. Therefore, this Court should tell the Grand Aerie that it must live with its freely chosen tactical litigation decisions by denying the Application in its entirety.

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COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Kegan McClelland's Brief Life and Horrible Death

On April 29, 2000, two months short of his third birthday, Kegan McClelland, the only child of Mike McClelland and Lacy Harter, tragically drowned when he fell into an open septic tank hole while playing at a Family Fun Day celebration at Eagles Hall #3607 in Howell, Michigan.

Lacy's oldest sister Rhonda Harter had invited Lacey and Kegan to the Eagles Family Fun Day. (Tr. 11/13/01, p. 177). There were about 20 adults and 15 children outside playing games and other activities. (Tr. 11/13/01, p. 180). After Lacy went inside to take a telephone call, Rhonda caught an odor of septic sewage and first realized that Kegan was gone when she saw another little boy standing next to the septic tank's unlatched, open lid. (Tr. 11/13/01, p. 181). The other little boy told her that Kegan was in the hole. (Tr. 11/13/01, p. 181).

When Lacy returned and discovered what had happened, she let out a horrific scream. (Tr. 11/13/01, p. 11). She and other adults frantically searched to see if Kegan could be anywhere else. (Tr. 11/13/01, p. 13). Delbert Phillips and others began poking into the septic sludge with sticks, actually feeling Kegan's little body, but they were helpless to get him out of the full, seven-foot deep sewage tank. (Tr. 11/13/01, p. 13).

The continuously screaming Lacy had to be physically restrained from diving into the septic pit herself. (Tr. 11/13/01, p. 13). First, the paramedics, and then the Fire Department arrived, but they too stood by waiting helplessly until a Fire Department diver, Andrew Daus, arrived in a full wetsuit with oxygen and was lowered through the two foot wide hole to recover Kegan from the bottom. (Tr. 11/7/01, p. 35-38). The toddler was covered in black sewage, his body blue and bloated. (Tr. 11/13/01, p. 13). Kegan was immediately transported to the hospital

where he was pronounced dead at 5:17 p.m. on April 29, 2000. (Tr. 11/13/01, p. 118).

Statement of the Trial Court Proceedings

Plaintiffs filed the wrongful death suit against the Local (Howell Aerie #3607), State (Michigan State Aerie) and National (Grand Aerie Fraternal Order of Eagles) and others (Harris Septic Tank, Dale Harris and American Concrete Products) who settled before trial. Lacy Harter also asserted a bystander emotional distress claim. On July 19, 2001, the Grand Aerie's MCR 2.116(C)(10) summary disposition motion was denied for genuine issues of material fact. The Court, in denying the motion was presented with an avalanche of evidence as to this fraternal organization. The by-laws were such that the Grand Aerie controlled the Local.

During discovery, notwithstanding Plaintiffs' diligent efforts, and the trial court's orders to produce, the Grand Aerie repeatedly refused to disclose the existence of its insurance coverage or the identity of its excess carrier. The Grand Aerie's refusal completely thwarted the case evaluation process and all meaningful pretrial settlement discussions. Following the egregious litany of discovery shenanigans by the Grand Aerie (described in Issue I) that culminated at the Final Settlement Conference and on the first two days of trial after the jury had already been impaneled, Judge Burress struck the Grand Aerie's answer and defaulted it as to liability only–not as to damages. Thus, the claim hear that the Defendant was somehow subjected to an extraordinary sanction is totally false.

In the meantime, Howell Aerie #3607 agreed to a $300,000/$200,000 high/low settlement, admitting liability and acknowledging that it was an agent of both the Michigan Aerie and the Grand Aerie. The parties agreed to dismiss the

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Michigan State Aerie.[1] Accordingly, the case was jury tried to determine damages only.

On November 15, 2001, the jury unanimously awarded $3 million to Kegan's Estate for his conscious pain and suffering, $1 million for present lost society and companionship, $1 million for future lost society and companionship. The jury also awarded $750,000 to Lacy Harter for present non-economic losses on her bystander claim, $1 million for her future non-economic losses on the claim, $85,000 for her present economic losses and $1 million in future economic losses (Tr. 11/15/01, p 5-7). The $50,000 award for Kegan's reasonable medical, burial and funeral expenses was reduced to $9,000. Judgment was entered on March 12, 2002. The Grand Aerie's post-trial motions were denied and it appealed.[2]

On April 22, 2004, the Court of Appeals affirmed. On June 1, 2004, the Grand Aerie filed this leave application. Further facts and proceedings will be set forth in detail in the context of the issues.

LAW AND ARGUMENT

I. THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION BY DEFAULTING THE GRAND AERIE AS TO LIABILITY WHERE IT PREJUDICED PLAINTIFFS BY REPEATEDLY FLOUTING THE COURT'S DISCOVERY ORDERS AND MADE A MOCKERY OUT OF THE FINAL SETTLEMENT CONFERENCE WHILE THE JURY SAT "TWIDDLING THEIR THUMBS" FOR THE BETTER PART OF TWO DAYS.

Judges Cooper and Fort Hood carefully evaluated the trial court record, correctly recognized that Judge Burress considered all of the appropriate facts for

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[1]Attorney John Cothorn represented both the Michigan State Aerie and the Grand Aerie throughout the trial court proceedings.

[2]The Grand Aerie's case caption which the Court of Appeals used on its opinion erroneously lists the Howell Aerie #3607 as a Defendant-Appellee. The Grand Aerie never listed Howell #3607 as an Appellee in its Claim of Appeal, it has never made any specific argument against Howell Aerie #3607 and no one appeared at the Court of Appeals on the Howell Aerie's behalf. Howell Aerie #3607 is actually a non-participating Defendant.

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imposing sanctions before making his determination, and concluded that he "properly entered a default judgment against defendant for its flagrant and wanton discovery violations." (Exhibit 41; Slip Opinion, p. 4). As the majority explained, "it is clear that defendant was defaulted for its own egregious behavior pursuant to MCR 2.313(B)(2)(c)," adding that "[t]he blame for discovery violations was properly placed on defendant."[3] (Exhibit 41; Slip Opinion, p. 5). The Court of Appeals' affirmation of Judge Burress is not clearly erroneous, not materially unjust, and, in the final objective analysis, the Application establishes no grounds for Supreme Court intervention of any kind.

A. The Grand Aerie's Flouting of Discovery Orders

Despite Plaintiffs' repeated discovery requests (Exhibit 1: Interrogatories 2/15/01; Exhibit 2: 7/6/01 Motion to Compel Answers), and later, the trial court's order (Exhibit 3: Order Granting Motion to Compel Answers), the Grand Aerie refused to disclose $6 million in excess insurance coverage until the day before trial at the final settlement conference. Earlier, at case evaluation, this non-disclosure had led the panel to evaluate the case in the $2 million range which was the amount of insurance coverage Defendants had falsely claimed (Exhibit 4: Cothorn Letters 2/22/01, 5/7/01, 5/10/01 disclosing only $2 million in coverage). When Judge Burress learned of the $6 million in excess coverage, he gave the Grand Aerie three more opportunities to produce representatives of the insurance carriers with full settlement authority to discuss settlement before the trial commenced. Finally, after three days with the jury empaneled but waiting idly in the jury room, the judge became fed up with these shenanigans and defaulted the

[3]Judge O'Connell agreed that "the Grand Aerie's part in the negotiation fiasco warrants some sanction," but vigorously disagreed with the majority that the jury's default judgment verdict "approximates the severity of the offense." (Exhibit 41; Slip Opinion, O'Connell concurrence/ dissent, pp. 2-3). The problem with the dissent is that the verdict was not the sanction. The sanction was the default. The Defendants were permitted to vigorously dispute damages.

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Grand Aerie as to liability and tried the case on damages only (Exhibit 5: Order of Default). As the following discussion of the record and the law demonstrates, the trial court did not err in defaulting the Grand Aerie.

B. The Trial Proceedings Leading Up To the Default

On Monday, November 5, 2001, the date set for trial, Judge Burress opened the record by stating that he had adjourned the final settlement conference from its November 2, 2001 date after the Grand Aerie first revealed the existence of the $6 million in excess coverage (Tr. 11/5/01, p. 4-5). In doing so, he ordered defense counsel to bring in the excess carrier to continue settlement discussions (Tr. 11/15/01, p. 5). Plaintiffs' counsel reminded the court that, notwithstanding its August 2001 order that the Grand Aerie "produce certified copies of all declaration sheets for all insurance policies available to both Defendants . . . " and that they fully answer interrogatories 8 and 9, this was never done (Tr. 11/5/01, p. 5). Moreover, the Court's Final Pretrial Order which had ordered the November 2, 2001 settlement conference required the attendance of representatives with the "full" authority to settle. Of course, the Defendant Grand Aerie also ignored this Order and brought no one.

It is also significant that the Defendant willfully violated the Court's Order to answer interrogatories regarding insurance, and had, in fact, produced false information.

Plaintiffs' counsel further explained that, earlier that morning, defense counsel produced Diann Ralko who claimed to be appearing for the excess carrier Legion Insurance on behalf of Toplis and Harding, an independent adjusting agency from Chicago (Tr. 11/5/01, p. 6). Plaintiffs' counsel disputed Ralko's settlement authority, calling her a "ringer." Plaintiffs moved for a default stating

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that Defendants had now twice ignored the court's orders with respect to discovery and the settlement conference (Tr. 11/5/01, p. 7-8).

Following defense counsel's false representations that Legion was both the primary and the excess carrier, and that "she had full authority" (Tr. 11/5/01, p. 10), the judge put Ralko on the stand. Ms. Ralko admitted that she had never spoken to Legion Insurance Company (Tr. 11/5/01, p. 13-14). While she insisted she had full settlement authority, when asked whether the excess carrier was waiving any lack of notice defense, she said that she did not have that authority (Tr. 11/5/01, p. 16-18).

When Ralko stated that she had spoken to Donna Hollingsworth who worked for Crawford Adjusting and who had appeared at settlement conference the past Friday with authority on the primary policies, but not on the excess, the court's incisive question was, "How does she [Hollingsworth] get authority now [on Monday] for the excess?" (Tr. 11/5/01, p. 18).

Plaintiffs' counsel asserted that the defense conduct was a mockery and highly prejudicial since at case evaluation it had repeatedly represented that there was only $2 million in coverage (the amount the case was ultimately evaluated at) and since Ralko could not waive the excess carrier's lack of notice defense (Tr. 11/5/01, p. 19-20).

The court decided to give Defendants yet another chance and "withhold a ruling on the motion for default," to select a jury since the venire was waiting, and to start trial on Tuesday, November 6, 2001 (Tr. 11/5/01, p. 21). The court further ordered that Defendant produce the insurance declaration sheets and a certification from the insurance company:

> I have my concerns about the process that's going on here. I don't have a clear understanding as to why it is that dec sheets for the excess have not yet been furnished, in spite of my August 2nd order, August 10th order this year.

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I want by the end of today two things. I want the dec sheets in Mr. Fieger's hands. I want certification from the insurance company on their letterhead that this representative here today represents them in this claim before this Court. Has full authority for settlement negotiations in this matter. And that they have knowledge of this claim and the pendency of this litigation. In writing, their stationery before the end of the day today in Mr. Fieger's hands. (Tr. 11/5/01, p. 22).

After this defense charade, that evening at 6:30 p.m., Plaintiffs' counsel received a fax which he read into the record the following morning:

"Dear Mr. Cothorn: This will confirm that the Legion Insurance Company through its authorized claim administrator McClarin's Topless had arranged to have an independent adjuster, Mrs. Ralko attend the mandatory settlement conference before Judge Daniel Burress on Monday, November 5, 2000 with settlement authority for one million dollars of coverage for each occurrence available under the insurance policy.

Additionally, she was given authority for excess coverage which was believed to be held by Legion which was subsequently found not to be the case.

At the request of Mr. Cothorn for information requested by the Court it was first discovered that Legion had issued only the primary and not any excess policies. It was thereafter determined that Great American Ohio Casualty was, in fact, the excess carrier and they were immediately notified." (Tr. 11/6/01, p. 10-11).

Upon this latest bombshell that Ohio Casualty, not Legion, was the excess insurer, Plaintiffs' counsel renewed the request for a default as to liability, asserting that it was "impossible for this Court to have engaged in meaningful settlement negotiations with a six million excess [hidden], the two million dollar basic coverage [with Defendants] not revealing who the excess carrier was and not allowing the excess carrier to have notice" (Tr. 11/6/01, p. 8-9). Thereafter, Judge Burress made the following statements and rulings:

THE COURT: I think that Mr. Fieger fairly, accurately quoted me from our in chambers conference yesterday.

* * *

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That somebody was going to burn. I don't usually use language like that. I'm more reserved than that. But, frankly I did not believe that lady [Diann Ralko].

* * *

I don't believe she had authority. And I thought she was a ringer (Tr. 11/6/01, p. 17-18).

* * *

THE COURT: There is a serious breakdown of communications in this case. And I note today that you [defense counsel] still sit with an empty chair next to you (Tr. 11/6/01, p. 21).

* * *

THE COURT: I wanted this matter brought to a conclusion before you made your opening statements to the jury. There's a reason for it. We all understand it now. **What is the sanction that I should impose in this case against the Grand Aerie**? (Tr. 11/6/01, p. 27, emphasis added).

When Judge Burress reiterated this question, defense counsel Cothorn professed that, "I'm suddenly without words," adding "I really honestly can't give you an answer right now." (Tr. 11/6/01, p. 28). Offered no specific, lesser sanction by the Grand Aerie's attorney, the Judge continued:

We all ought to be ashamed of what's happened here. Everyone of us. And I'll start with taking the blame of not finding someone in contempt or issuing sanctions when I was pushed to make sure that the answers to these interrogatories were filed and whoa to the next lawyer who comes to this Court that hasn't complied with these kinds of interrogatories. I am tempered by the experience here.

The other telling remark is that they never intended to tender their policies. And I have to ask the question whether what is going on here was an attempt at avoidance of confronting the Court and the parties as it relates to those policies. (Tr. 11/6/01, p. 32-33).

* * *

I suspect that there will be serious long term litigation over collection to the extent that a large judgment is awarded in his case. Which will put the plaintiffs in this case into the legal system for years to come possibly.

The other alternative is to get all parties to the table now. I am prepared to send this jury home. I want authorized representative from the company, I don't want, I don't want Crawford, I don't want Topless. I want someone from the company

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with authority to write a check from Ohio and from–Legion in this courtroom together with authorized agents from the parties. They can land their company jets at Livingston International. I'm prepared to do that anytime today.

Or I can enter a default in this case. What would you like? (Tr. 11/6/01, p. 33-34).

At this point, defense counsel again responded with no specific sanctions alternative to default, but promised the court that he would make every effort "to contact a warm body with the insurance company . . . to have that person here" (Tr. 11/6/01, p. 34). He asked for "until tomorrow morning, there should be a warm body here" (Tr. 11/6/01, p. 36). At this, Judge Burress warned him, "I don't want just a warm body, I want somebody . . . with a pen and a check" (Tr. 11/6/01, p. 36-37). Very reluctant to enter a default, Judge Burress offered to make himself available anytime during the day today "even after 5:00" in the event Mr. Cothorn got the insurance representative in because "I want movement towards this process working the way it is suppose[d] to work." (Tr. 11/6/01 p. 39, 42).

The next morning, Wednesday, November 7, 2001, defense counsel appeared with Attorney John Monnich, who claimed that he had full settlement authority for the excess carrier, Ohio Casualty (Tr. 11/7/01, p. 4). Also present was Alan Kindig from Legion Insurance Company (Tr. 11/7/01, p. 14). He asserted that Legion had one million in primary policy limits. Kindig stated that he was there to start negotiating a settlement from "square one" (Tr. 11/7/01, p. 20). Until Tuesday, November 6, 2001, Kindig was not aware that Judge Burress had ordered the parties, the attorneys and insurance company representatives to appear the previous Friday, November 3, 2001 (Tr. 11/7/01, p. 21).

Plaintiffs' counsel asserted that, given Ohio Casualty's late entry into the case, Plaintiffs had been severely prejudiced because Ohio Casualty would deny coverage and would defend by bringing a lack of notice action regarding its policy (Tr. 11/7/01, p. 25). Only by defaulting the Grand Aerie as to liability would

Plaintiffs have the possibility of recovering a judgment. (Tr. 11/7/01, p. 25-26). Ohio Casualty did refuse to waive notice. (Tr. 11/7/01, p. 11-12).

Judge Burress recognized how obviously emotional it was for Plaintiffs to participate at the settlement conference (Tr. 11/7/01, p. 50-51). The court said that:

> The order of this court was not timely complied with. As a matter of fact, the order requiring answers to interrogatories has never been complied with and I'm satisfied that the failure to provide first of all the information and secondly an agent at the settlement conference has so frustrated the process that it just can't be restored. I'm not going to let this jury set back twiddling their thumbs again all day today.
>
> I am entering, I'm striking the answer of the Grand Aerie. I'm entering their default. You may prepare an order. (Tr. 11/7/01, p. 52).

Plaintiffs then offered to dismiss the Defendant State Aerie which Mr. Cothorn accepted, and the case proceeded to trial against the Grand Aerie on the issue of damages only (Tr. 11/7/01, p. 52-54).

Post-trial, the Grand Aerie moved to set aside the default (Tr. 12/13/01). Judge Burress reminded defense counsel that as a result of Defendant's intransigence, Plaintiffs did not finally learn who the excess carrier was until November 6, 2001 at 6:30 p.m. after the jury had been empaneled, delaying the trial for two days (Tr. 12/13/01, p. 10-11). After hearing Mr. Cothorn's response that, when Judge Burress ordered him to produce an insurance representative with settlement authority, Mr. Cothorn "had a warm body there" (Tr. 12/13/01, p. 15), Judge Burress denied the motion declaring, "I'm satisfied the record has been fully established in this case . . . " (Tr. 12/13/01, p. 17).

C. Counter-Statement of Standard of Appellate Review

Defendant claims that the trial court abused its discretion in granting default and then refusing to set the liability default aside. MCR 2.603(D)(1) provides:

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(1) A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed.

A party seeking to avoid or set aside a default must establish both good cause and a meritorious defense. Alken-Ziegler v. Waterbury Headers Corp., 461 Mich. 219, 229 (1999). Review is for a clear abuse of discretion which amounts to "far more than a difference in judicial opinion." Alken-Ziegler at 227. As that Court explained:

> This Court historically has cautioned appellate courts not to substitute their judgment in matters falling within the discretion of the trial court, and has insisted upon deference to the trial court in such matters. For example, the Court stated in Scripps v. Reilly, 35 Mich. 371, 387 (1877):
>
> > It can never be intended that a trial judge has purposely gone astray in dealing with matters within the category of discretionary proceedings, and unless it turns out that he has not merely mis-stepped, but has departed widely and injuriously, an appellate court will not re-examine. It will not do it when there is no better reason that its own opinion that the course actually taken was not as wise or sensible or orderly as another would have been.
>
> And in Detroit Tug & Wrecking Co. v. Garner, 75 Mich. 360, 361; 42 N.W. 968 (1889), the Court said:
>
> > To warrant this Court in interfering in matters so entirely in the sound discretion of the circuit court as the granting or refusing of a new trial, the abuse of discretion ought to be so plain that, upon consideration of the facts upon which the court acted, an unprejudiced person can say that there was no justification or excuse for the ruling made. 461 Mich. at 228 (footnote omitted).

As the Court of Appeals recognized, in reluctantly granting the default, Judge Burress relied on MCR 2.313(B)(2)(c) which provides that if a party fails to obey an order to provide or permit discovery, the court may render "an order striking pleadings or parts of pleadings, . . . dismissing the action or proceeding or

a part of it, or rendering a judgment by default against he disobedient party . . . " Review of a trial court's imposition of discovery sanctions is also for an abuse of discretion. *Bass v. Combs, 238 Mich. App. 16, 26 (1999).* Under the facts of this case, and these applicable standards, Defendant's contention that the trial court abused its discretion is totally without merit.

D. The Trial Court Properly Struck the Grand Aerie's Answer Where Defendant and its Agents Willfully Defied Discovery and Made a Mockery of the Final Settlement Conference, Severely Prejudicing Plaintiffs and Delaying the Trial for Two Days.

Essentially, Defendant presents a two prong argument against the default. First, the Grand Aerie claims that it is not responsible for its non-compliance with the court's orders, it is the adjuster's, or more obliquely, the Grand Aerie's trial attorney's fault. Second, it cavalierly asserts that the default sanction was too harsh and that Plaintiffs could not have been prejudiced because the Grand Aerie was not going to settle anyway. As the Court of Appeals recognized, neither argument withstands scrutiny. The Grand Aerie cannot escape responsibility for its failure to timely disclose the excess policy by blaming its attorneys/agents, and Plaintiffs have been severely prejudiced by the Grand Aerie and its agent's and attorney's overall course of misconduct that has prolonged the litigation and made the full vindication of Plaintiffs' rights a matter of conjecture

1. The Court of Appeals Committed No Error.

As the majority Court of Appeals opinion recognized at page 2, the Grand Aerie's February 21, 2001 verified answers were false. But when Plaintiffs' counsel sought to verify coverage and policy limits at Richard Downer's March 14, 2001 deposition, he was rebuffed by Defendant's attorney. Even though Downer who himself was a member of the Grand Aerie, and whose defense counsel represented both the Grand Aerie and the Michigan Aerie was asked to bring these documents which he admitted he kept track of, and even though they were

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kept only a block away from where the deposition was being conducted, defense counsel Cothorn refused to have Downer get them (Exhibit 6: Downer dep., p. 63-64, 101-102).

Likewise, when the Grand Aerie National Secretary, Robert Wahls was deposed by telephone on April 21, 2001, he claimed he had no idea what the liability policy limits were, and when Plaintiffs' counsel Giroux again asked Mr. Cothorn about this, he was rebuffed with, "That is in the works." (Wahls Dep. p. 74-75). The Grand Aerie can be presumed to have kept records on who it paid for what insurance. Yet the Grand Aerie never accurately advised Plaintiffs who the excess carrier was until Tuesday, November 6, 2001 at 6:30 p.m. after the jury had been empaneled. The Court of Appeals did not clearly err by reciting the Downer deposition testimony in concluding that Judge Burress' default ruling was not an abuse of his discretion.

2. The Trial Court and the Court of Appeals Majority Correctly Recognized That "The Blame for Discovery Violations Was Properly Placed on Defendant."

Defendant's argument that it was not responsible for its continuing failure for nine months to correctly answer the discovery requests and comply with the court's orders because it was McLaren Toplis/Crawford/Cothorn's fault frankly sounds like an appellate criminal defendant who asserts that the judge was unfair and his lawyer was bad. The Court of Appeals saw through this and rejected defense counsel's appellate argument which admitted the conduct of the Grand Aerie's insurance companies was egregious, but ignored trial defense counsel's "own inappropriate conduct throughout the pretrial process" and tried to claim that the Grand Aerie was not responsible for either the conduct of the insurance carriers or trial defense counsel.

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This "tripartite relationship between insured, insurer and defense counsel"[4] does not save the Grand Aerie. First, "the neglect of an attorney is generally regarded as attributable to his client." *White v. Sadler, 350 Mich. 511, 522 (1957), Weisman v. Newton Beef Co., 154 Mich. 511, 513 (1908).* Second, this Court has held it improper to sanction the insurance company for mishandling answers to interrogatories because the insured, as the client and its attorney are chargeable with those answers. *Kirschner v. Process Design Associates, Inc., 459 Mich. 587, 598 (1999).* Third, this Court should heed the Court of Appeals majority's condemnation of the Grand Aerie's attempted denial of any responsibility:

> "It is absurd to assert that defendant did not know to whom insurance premiums were sent and the amount of coverage obtained. Defendant continually failed to provide truthful information regarding its own insurance coverage, and therefore, certainly played a role in this farce upon the court. The blame for discovery violations was properly placed on defendant." (Exhibit 41, Opinion, p. 5).

In *Kalamazoo Oil Co. v. Boerman, 242 Mich. App. 75, 86-90 (2000)*, the Court of Appeals affirmed a default as to liability where defendant expressed disdain for the authority of the court and refused to cooperate in trial proceedings. The severe sanction was warranted for his flagrant and wanton refusal to facilitate discovery. And, in *Bass v. Combs, 238 Mich. App. 16 (1999)*, the Court of Appeals affirmed the dismissal of plaintiff's claim where interrogatories remained unanswered despite the court's orders. The Court of Appeals pointed to the undue delay and the adverse impact on defendant's ability to adequately prepare his defense. The Court explicitly rejected plaintiff's contention that the trial court could not resort to the severe sanction of dismissal without first having imposed a "trail of lesser sanctions." *238 Mich. App. 35.* As the Court aptly stated:

> Under the facts of this case, we are not persuaded that the trial court abused its discretion in granting a default judgment as a sanction for

[4] *Atlanta International Ins. Co. v. Bell, 438 Mich. 512, 520 (1991).*

> failure to comply with discovery. Defendants were afforded a number of opportunities to comply with the discovery request and failed to do so and had even been warned that a failure to comply with the discovery request would result in a default judgment, yet they still chose not to comply with the discovery request. Under the these facts, it was within the trial court's discretion to grant a default judgment for defendants' blatant refusal to comply with the discovery request and the court orders compelling compliance. *Id. at 36.*

Recently, this Court affirming a default as to liability for a defendant's failure to participate in discovery, quoted with approval the trial court's remarks:

> The purpose of a default judgment is to discourage attorneys from failing to represent their clients in a reasonably diligent and prompt manner. Unfortunately, it has the effect of adjudicating matters not on the merits alone. However it is appropriate in specific circumstances and unfortunately, the court believes that this is one of them." *Zaiter v. Riverfront Complex, Ltd., 463 Mich. 544, 550 (2001).*

The *Zaiter* court noted that, under *Alken-Ziegler*, it did not even need to reach the question of meritorious defense since defendant failed to establish good cause. *463 Mich. at 553 n 9.* So it is here.

On the record presented, the Grand Aerie's due process lack of notice argument is not remotely credible. This is not a case like *Transamerica Const. Co. v. Kulyk, unpubl. No. 211943, 2000 WL33534072 (unpubl. 2/11/00)*, which is without precedential authority in any event, where the trial court entered a default judgment without a motion and without first considering other available sanctions. By contrast, see *Zaiter v. Riverfront Complex, supra at 556* [constitutional right to jury trial preserved by trial on damages]. Here, the trial court repeatedly gave Defendant opportunities to comply with its orders and specifically asked defense counsel to propose alternative sanctions to no avail. In response, for days, while a jury was waiting, the Defendant committed fraud upon fraud on the Court.

The trial court did not abuse its discretion in defaulting Defendant. The Application should be denied.

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3. The Trial Court Carefully Considered the Grand Aerie's Action in the Context of the *Dean* Factors, Including the Severe Prejudice to Plaintiffs, and Only Opted to Default Defendant as a Last Resort.

Applying the *Dean v. Tucker, 182 Mich. App. 27, 32-33 (1990)*, factors, the Court of Appeals said:

> "Defendant repeatedly failed over a nine-month period to provide truthful and complete information regarding its liability insurance, even upon court order. Defendant's misinformation caused the case to be severely under evaluated. At the brink of trial, and under threat of default, defendant continued its discovery antics. Plaintiffs were severely prejudiced by defendant's dilatory tactics as Ohio Casualty intended to reinstate negotations and assert lack of notice as a defense." (Exhibit 41, Opinion, p. 4).

As Plaintiffs asserted, one may fairly conclude that the Grand Aerie and/or its now insolvent primary insurer Legion wanted to keep the excess insurer in the dark to prevent Great American/Ohio Casualty from pressuring the primary carrier to get serious about settlement instead of standing on its measly $250,000 offer. Ohio Casualty needed to be an intergral part of any settlement discussions. See *Kornak v. ACIA, 211 Mich. App. 416. 422 (1995)* [purpose of MCR 2.401 is to have the insurance company send a representative "who has unlimited authority and unfettered discretion to settle the case and who is able to participate in meaningful settlement negotiations"]. Instead, the excess insurer Ohio Casualty can now assert a lack of notice defense with respect to its $6 million in coverage [in fact, they have!]. Further, when the case was evaluated, the panel awarded $2.3 million, which is what they were falsely told by Legion was the policy limits for all insurance. As it stands now, Plaintiffs will likely be engaged in years of litigation to satisfy the judgment against the Grand Aerie. They have certainly been severely prejudiced by Defendant's frauds all the way into trial on the question of insurance policy coverage.

Moreover, *Dean* does not support relieving the Grand Aerie of its default here. The Grand Aerie's misconduct here is light years removed from the *Dean* indiscretion of filing a witness list late, but still two and one half months before trial. The non-exhaustive list of factors in *Dean* is not particularly helpful here where Defendant cannot establish good cause for its conduct and Plaintiffs have shown that they have been seriously prejudiced. Nor are the cases that Defendant cites involving minor discovery or litigation misconduct helpful to its argument. First *Daugherty v. Michigan, 163 Mich. App. 697 (1987), Belloc v. Koths, 163 Mich. App. 780 (1987)* and *Edge v. Ramos, 160 Mich. App. 231 (1987)*, all affirmed the dismissal. The other cases involved simple squabbling over deposition dates. None involved the kinds of misconduct and prejudice to Plaintiffs that occurred in this case. None involved leaving a jury cooling its heels while Defendant dithered over disclosing how much insurance coverage it actually had.

The record establishes that Judge Burress was very patient with Defendant. He did not abuse his discretion. Far from Defendant's mischaracterization of the trial court's entry of default as a "reversibly prejudicial overreaction," Judge Burress patiently gave Defendant and defense counsel at least four chances to comply with his orders before he entered the default. The ruling was the product of the judge's sound exercise of discretion, and not remotely an abuse of discretion. The Court should deny the Grand Aerie's Application.

II. THE TRIAL COURT AND THE COURT OF APPEALS CORRECTLY HELD THAT THE GRAND AERIE CANNOT RELITIGATE LIABILITY ONCE IT WAS DETERMINED BY THE DEFAULT THAT STRUCK ITS ANSWER.

Before trial, the Grand Aerie's motion for summary disposition pursuant to MCR 2.116(C)(10) was denied. (Tr. 7/19/01, p. 10-11). The Grand Aerie

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continues to falsely assert that this claim was asserted against it purely as a matter of vicarious liability. Plaintiffs Amended Complaint (Exhibit 7) asserted both independent negligence and vicarious liability theories against the Grand Aerie (Tr. 6/27/02, p. 23-26; Tr. 7/24/02, p. 24-26; Tr. 10/9/02, p. 34). Paragraphs 22-26 of Count I allege that the Grand Aerie owed direct duties to business invitees and the general public to exercise reasonable care that the property was safe and free of any inherently dangerous or unsafe conditions, to warn of such conditions, and to inspect the premises. It is not until Paragraph 27 that the Amended Complaint alleges a respondeat superior claim.

The Grand Aerie filed four briefs for summary disposition based on MCR 2.116(C)(10) on 2/16/01, 3/27/01, 5/15/01 and 6/4/01. Plaintiff responded in opposition asserting, inter alia, that the Grand Aerie is liable as #3607's principal, that the Grand Aerie has a possessory interest and exercised or had the right to exercise control over the property, that it assumed a duty to act with ordinary care for Plaintiffs and for Kegan McClelland and that a special relationship existed between Plaintiffs and the Grand Aerie (Court File, Plaintiffs' 3/21/01 Response).

At the July 19, 2001 hearing, the trial court recognized that there were "material questions of fact to be decided by the trier of fact" and he denied the (C)(10) motion (Tr. 7/19/01, p. 10-11). Pursuant to MCR 2.116(J)(2)(a), Defendant sought interlocutory review which the Court of Appeals denied by Order entered October 26, 2001 (Exhibit 8). When Defendant challenged the ruling post trial in the context of the propriety of the default order, Judge Burress reiterated that, having reviewed his notes from the summary disposition motion, the motion was properly denied (Tr. 10/9/02, p. 38-39).

The Court of Appeals found that review of the summary disposition was precluded because "the issue of liability was settled against [the Grand Aerie] in a properly entered default and defendant may not attempt to re-litigate that issue by

seeking reversal of the trial court's denial of its motion for summary disposition" (Exhibit 41, Slip Opinion, p. 5). The Court of Appeals ruling is correct.. But even if the issue is reviewed on the merits, the denial of summary disposition was proper.

A. The Grand Aerie is Estopped by the Default From Litigating Issues of Liability.

Upon entry of default, the well pled factual allegations of the complaint except those relating to damages are taken as true. *Ackron Contracting Co. v. Oakland County, 108 Mich. App. 767, 775 (1981).* Stated another way, a default settles the question of liability and precludes the defaulting party from litigating that issue. *Wood v. DAIIE, 413 Mich. 573, 578 (1982); Kalamazoo Oil Co. v. Boerman, 242 Mich. App. 75, 79 (2000).* Allowing the Grand Aerie to contest the summary disposition would render the entry of the default "meaningless." *Id. at 81.* The Court of Appeals correctly held that Defendant was estopped from litigating the summary disposition issue on appeal.

B. On the Merits, Judge Burress Properly Denied Summary Disposition.

Judge O'Connell's dissent on this issue in footnote 1 of his separate opinion is simply wrong. Indeed, it is unclear how the dissent even fathomed this argument. The facts show that Howell Aerie #3607 was part of a national organization, existing and governed by the Grand Aerie. As Lacy Harter's Affidavit established, the Grand Aerie has a property right in the building and the land of the Howell Aerie. (Exhibit 9, ¶4). The Grand Aerie has control over the land and the building. (Exhibit 9, ¶5). The rules and regulations controlling the Howell Aerie and its activities were created by the Grand Aerie. (Exhibit 9, ¶6). The Howell Aerie is run according to Grand Aerie rules for Grand Aerie purposes and that the members pay money, through taxes, to the Grand Aerie. In return, the

Grand Aerie guides, instructs and regulates the Howell Aerie through the Michigan Aerie. (Exhibit 9, ¶8). All real estate and building matters have to approved by the Grand Aerie. (Exhibit 9, ¶10). In fact, much of what the Howell Aerie does is controlled by the Grand Aerie through the constitution and statutes which make up Grand Aerie law. (Exhibit 9, ¶12-16).

The testimony of Robert P. Wahls, Secretary for the Grand Aerie was completely consistent with the Affidavit of Ms. Harter. Mr. Wahls made it clear that the constitution and the statutes of the Grand Aerie have to be followed by every single member of every single local Aerie. (Exhibit 10: Wahls dep. excerpts, p. 12). If they are not, the person violating them will be brought up on charges. (Exhibit 10, p. 12). The entire matter will be reviewed by the Grand Aerie after which the local hall will have to do whatever it's told. (Exhibit 10, p. 13). In discussing the existence of the different portions of the Fraternal Order of Eagles and the relationships between them, Mr. Wahls stated that there is only one organization. (Exhibit 10, p. 16). It is made up of all Aeries, meaning every single local, the Michigan and the Grand. The organization operates as a whole. (Exhibit 10, p. 70).

Even though it is a single organization, it is clear that the Michigan and the Grand Aeries are the **controlling** authorities. Mr. Wahls stated that the Grand Aerie regularly reviews matters occurring at the various local halls. (Exhibit 10, p. 20). The Grand Aerie can suspend, close down or take other disciplinary action against any local hall. (Exhibit 10, p. 28). Disciplinary charges can result from any violation of the provisions of the constitution and the statutes. (Exhibit 10, p. 28). Grand Aerie law provides that the Grand Aerie and State Aerie have such a supreme power of control that they can commission an officer to a local Aerie to do whatever is necessary to fix any problem. (Exhibit 10, p. 29-30).

Significant provisions of the Constitution and statutes disclose the breadth of jurisdiction, power and control the Grand Aerie has over the local Aeries:

> "The Grand Aerie shall have the power to provide for the creation and institution of State, Provincial and Local Aeries and Ladies Auxiliary units, to enact laws for their government, to adopt rules and regulations for their conduct and to levy and collect per capita tax from the local Aeries and Local Ladies Auxiliary." (Exhibit 11, §6(d).
>
> "Once organized, it shall be mandatory upon a Local Aerie to become a member of and maintain membership in such State or Provincial Aerie, and the Local Aerie shall thereafter at all times be subject to the constitution and bylaws of such State or Provincial Aerie." (Exhibit 11, §14).
>
> "In all cases where an Aerie is incorporated, such Articles of Incorporation shall contain therein provisions that said Aerie is incorporated in conformity with, subject to and under the jurisdiction and control of the laws of the Fraternal Order of Eagles." (Exhibit 11, §123.6).
>
> (See also Exhibit 11, §9, 10, 63.2, 122.1 and 123.4).

From the very beginning of the operation of a local hall, the Grand Aerie exercises its power and control. The Grand Aerie always sends a counselor to the hall to provide instruction and guidance. (Exhibit 10, p. 35). The guidance and instruction relates to all phases of operation including social matters. (Exhibit 10, p. 35). The counselors instruct on the manner and method of operation. (Exhibit 10, p. 37). The right and the power to control continues throughout the existence of the local hall. If a local hall wants to acquire more assets or do anything relative to its land or its building, it has to get approval from the Grand Aerie. (Exhibit 10, p. 49). The various powers of control that the Grand Aerie has over the local hall are effectuated mainly through the use of commissioned officers. (Exhibit 10, p. 50-51). Even if a local hall wanted to get out from under the blanket of control of the Grand Aerie, it could not. Mr. Wahls testified that a local Aerie absolutely cannot create any of their own house rules or bylaws that conflict with the constitution or statutes of the Grand Aerie. (Exhibit 10, p. 67). Mr. Wahls said

that if a local Aerie tries to do that, the Grand Aerie would send in a commissioner to rectify the situation. (Exhibit 10, p. 67).

Although the local halls have their own officers and trustees, these persons must carry out their duties in strict adherence to the constitution and laws of the Grand Aerie. (Exhibit 10, p 68). If these local officers and trustees do not carry out their duties as such, then they are violating their duties and someone could file a complaint to cause the Grand Aerie to take action to curb the misconduct. (Exhibit 10, p. 68-69). If something such as a public health threat had been created or allowed to exist on the land of a local hall, the Grand Aerie would have the right to control and intervene. (Exhibit 10, p. 68). Mr. Wahls stated that if and when something like that occurred:

> "Normally, we would probably send a letter to the local Aerie saying we've been informed of this, is it true, if it is, **take care of it**, something like that." (Exhibit 10, p. 86-87).

Richard Downer is the Secretary for the State Aerie. His testimony, like the testimony of Mr. Wahls, was completely consistent with Lacy Harter's Affidavit. Mr. Downer discussed the close relationship between the local halls and the state and Grand Aeries. Mr. Downer first discussed the money that was paid by the local Aerie to the State Aerie. (Exhibit 6: Downer dep. excerpts, p. 10). The local halls pay per capita taxes which go to the State Aerie and into the State Aerie bank account. That money is spent on State Aerie officers. (Exhibit 6, p. 11). Mr. Downer further discussed that officers are often sent from the Michigan Aerie to the local Aeries for particular events. (Exhibit 6, p. 14). These visits occur 4-6 times a month. (Exhibit 6, p. 14). In addition to the monthly visits, there are seminars that are provided by the State and Grand Aeries. At these seminars, members of local halls are provided with instruction, discussion and teaching. (Exhibit 6, p. 18). The relationship between the State and Grand Aeries and the local hall is so close and the right to control so pervasive that the local halls,

according to Mr. Downer, call him for guidance and instruction on a regular basis. (Exhibit 6, p. 27). The open septic tank defect on the Eagles property on April 29, 2000 was created by Howell Aerie #3607 trustees acting by authority of and pursuant to Grand Aerie law.

At his deposition, Trustee Ivan Brooks explained that the hall of the Howell Aerie, like all Aeries, is run by the trustees of the hall in accordance with the bylaws of the hall. The Grand and Michigan Aeries, either directly or through Grand Aerie law, i.e., the constitution and statutes of the organization, control the trustees and the bylaws. Mr. Brooks testified that the bylaws governing #3607 are approved by the Secretary of the Grand Aerie. (Exhibit 12, p. 24).

The defective lid for the septic tank was installed by one of the trustees:

Q: Was it the duty of any of the other trustees to help him as part of their maintenance of the building and grounds?

A: Possibly, if he asked.

Q: So it would have been a duty or obligation shared by all of them to some degree?

A: Well you could say that.

Q: That is their job, maintenance of the grounds and the building?

* * *

A: Yes.

Q: All of that comes from Grand Aerie law, is that right?

A: As far as their duties?

Q: Yes.

A: It's in the statutes, yes.

(Exhibit 12, p. 35-36).

This testimony regarding the Grand Aerie's control is also consistent with the case law describing the relationship between the Grand Aerie and local

Aeries. See, e.g., *Fraternal Order of Eagles Tenino Aerie No. 564 v. Grand Aerie Fraternal Order of Eagles, 59 P3d 655, 658 (Wash. 2002), cert. den. 123 S. Ct. 2221, 155 L. Ed. 2d 1107 (2003)* [In case over Grand Aerie's control over local chapter's admission of female applications, Court recognized Grand Aerie as "the overarching governing body, creating and enforcing the organization's rules and policies. Each local Aerie must adopt the Eagles Constitution and policies established by the Grand Aerie]. When there is evidence, either direct or inferential, the question of the existence of a principal-agent relationship is for the factfinder. *St. Clair Intermediate School District v. Intermediate Education Association, 458 Mich. 540, 556-557 (1998)*; *Vargo v. Sauer, 457 Mich. 49, 71 (1998)*; *Meretta v. Peach, 195 Mich. App. 518, 528 (1995)*. In *St. Clair*, this Court stated:

> "Under the common law of agency in determining whether an agency has been created, we consider the relations of the parties as they in fact exist under their agreements **or acts** and note that in its broadest sense, agency includes every relation in which one person acts or represents another by his authority." *Id. at 557* (Emphasis added). See also *Central Wholesale Co. v. Sefa, 351 Mich. 17, 26 (1958).*

Reviewing courts look to whether the principal and agent project the appearance of an agency relationship to third persons.

The factual inquiry involves the right to control. Thus, in *VanPelt v. Paull , 6 Mich. App. 618 (1967)*, plaintiff signed up for dance lessons at a dance studio being operated by defendant Paull. After the lessons started, Paull had financial difficulties and filed bankruptcy at which time plaintiff was still owed 208 hours of lessons. Plaintiff sued Paull as well as Arthur Murray Studios of Michigan, Inc., Doris Eaton Travis, Inc., and Doris Eaton Travis, individually. Plaintiff alleged that all had agency relationships with defendant Paull and therefore were liable. Affirming the trial court's finding of agency, the Court of Appeals, citing *Am.Jur.*

2d, Agency §21 and black letter Michigan law, said:

> The question of whether an agency has been created is ordinarily a question of fact which may be established the same as any other fact, either by direct or by circumstantial evidence . . .
>
> * * *
>
> Generally speaking, the test of principal and agent is the right to control. It is not the fact of actual interference with the control but the right to interfere that makes the difference between an independent contractor and a servant or an agent. *Tuttle v. Embury-Martin Lumber Co., 192 Mich. 385 (1916); 6 Mich. App. At 623-624.*

Defendant contorts *Rogers v. J.B. Hunt Transport, 466, Mich. 645 (2002)* to try to make it fit the facts of this case, but the attempt fails. In *Rogers*, this Court said that where a party's sole source of liability was vicarious and where a default was entered against the co-party agent, the principal was not precluded from contesting its own liability. *Rogers* does not say that where the vicariously liable principal itself is defaulted it can still contest its liability whether vicarious or direct. Stated otherwise, while the default of one party is not an admission of liability on the part of a non-defaulting party, its effect clearly is an admission of liability with respect to the defaulted party, here the Grand Aerie, who happens to be the uncooperative party.

The discussion of *Kubczak v. Chemical Bank & Trust Company, 456 Mich. 653 (1998),* also misses the point. The crux of that decision was the mortgagor/mortgagee relationship and the fact that as the Supreme Court explained, "the definite and continuous policy of this State [is] to save its mortgagors the possession and benefits of the mortgaged premises, as against the mortgagees, until expiration of the period of redemption", *456 Mich. 680-661. Kubczak* does nothing to advance the Grand Aerie's summary disposition argument here.

Nor do *Kratze v. Order of Odd Fellows, 190 Mich. App. 38 (1991)* or *Colangelo v. Tau Kappa Epsilon, 205 Mich. App. 123 (1994)* support the Grand

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Aerie's position. *Kratze* is a land trespass case involving an encroaching building, not a premises liability case. *Colangelo*, a decision which the trial judge participated in as a Visiting Judge at the Court of Appeals, alleged negligent supervision, not premises liability, and was decided based on legal duty, not the presence or absence of a principal-agent relationship.

The present case is factually far more analogous to *Ballow v. Sigma General Fraternity, 352 SE2d 488 (S.C., 1986)*, a South Carolina Supreme Court case discussed in note 1 of the *Colangelo* opinion. In *Ballow*, the national fraternity conceded that an agency relationship existed between it and the local chapter. Here, the Grand Aerie conceded the principal-agency relationship when it allowed itself to be defaulted on liability.

This case is also analogous to decisions applying the apparent agency doctrine in the franchisor-franchisee setting. These cases hold a franchise vicariously liable for the acts of its franchisee where: (1) the franchisor has represented or permitted it to be represented that the party dealing directly with the plaintiff is its agent; and (2) the plaintiff acting in justifiable reliance on such representation of the franchisor, has dealt with the agent to the detriment of the plaintiff. See e.g., *Shaffer v. Maier, 627 NE2d 986 (Ohio 1994)* [upholding apparent agency to oil refinery of aviation fuel dealer who mistakenly put jet fuel in propeller aircraft]; *Watson v. Howard Johnson Franchise Systems, Inc., 453 SE2d 755 (Ga. App. 1995)* [hotel franchisee apparent agent of hotel chain]; *Butter v. McDonald's Corp., 110 F. Supp. 2d 62 (DRI 2000)* [patron put hand through glass door apparent agency of franchisee question of fact]; *Sims v. Marriott Int'l, 184 F. Supp. 2d 616 (WD Ky. 2001)* [apparent agency question in hotel slip and fall]; *Miller v. McDonald's Corp., 945 P2d 1107 (Ore. App. 1997)* [patron bit into heart shaped sapphire stone, apparent agency issue of fact]; *Parker v. Domino's Pizza, 629 So2d 1026 (Fla. App. 1993)* [question of fact as to apparent agency in

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vehicular accident where franchisor promised delivery in 30 minutes or less]; *Crinkley v. Holiday Inns, Inc., 844 F2d 156 (CA 4 1988)* [affirming jury verdict on apparent agency against franchisor]. In Michigan, the following franchisor cases are on point: *Green v. Shell Oil Co., 181 Mich. App. 439, 445-446 (1989)* lv. den. 436 Mich. 877 (1990) and *Clark v. Texaco, Inc., 55 Mich. App. 100, 102 (1974)*, both finding material issues of fact that precluded summary disposition on apparent agency.

Here, the facts adduced in support of direct liability or an agency or apparent agency relationship are stronger than those presented in many of the cited cases. Because liability here was a question of fact, the trial court did not err in denying summary disposition before the trial. Given the subsequent default of the Grand Aerie on liability, the Court of Appeals correctly recognized that it need not even reach the merits of this question. The denial of summary disposition does not warrant plenary or peremptory Supreme Court consideration.

III. THE HIGH/LOW AGREEMENT WITH HOWELL #3607 WAS PROPERLY EXCLUDED FROM THE JURY.

Before trial began, Plaintiffs and Howell Aerie #3607 advised the court and the other parties that they had agreed to a $300,000/$200,000 high/low as to the Howell Aerie's liability (Tr. 11/5/01, p. 22-23). In exchange for Plaintiffs' agreement not to appeal the court's previous dismissal of Mike McClelland's infliction of emotional distress claim, #3607 admitted liability and acknowledged that it was an agent of the state and national Aeries and that they exerted some degree of control over #3607 (Tr. 11/5/01, p. 24-25). The Grand Aerie objected (Tr. 11/5/01, p. 26-27). The Howell Aerie responded that it was simply trying to limit its liability for very valid reasons (Tr. 11/5/01, p. 28). Judge Burress concluded that he was:

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> "satisfied that the agreement that has been reached is a customary agreement often arrived at between parties and that there is nothing fraudulent about what's going on with this one." (Tr. 11/5/01, p. 30).

Notwithstanding the court's clear ruling, after the Grand Aerie was defaulted on liability, its attorney again asked the court to disclose the high/low agreement to the jury (Tr. 11/7/01, p. 56-57). Judge Burress again rejected this argument (Tr. 11/7/01, p. 58).

During trial, defense counsel again argued that the high/low was an illegal "Mary Carter" agreement (Tr. 11/13/01, p. 130-135). The argument continued (Tr. 11/13/01, p. 193-202) with Judge Burress again ruling that this:

> "is not a true Mary Carter agreement. I'm satisfied that there's been full disclosure. And I am satisfied that it does not deny the non-agreeing defendants a fair trial." (Tr. 11/13/01, p. 202).

Nonetheless, the Grand Aerie raised the issue a fourth time and it was again rejected (Tr. 11/14/01, p. 55-57).

On October 9, 2002, Judge Burress denied the Grand Aerie's new trial motion saying that he was "satisfied that the high/low agreement entered into by the parties in this case was appropriate and legal":

> "I think that Mr. Cheatham recognized that he had no real defense on liability. That the damages in this case could literally go through the ceiling.
>
> I am satisfied that he acted in the best interest of his client. That there was no collusion accepting the high/low agreement that was placed on the record. That Mr. Cheatham did his best, during the course of this trial to keep damages at a minimum. He was not doing anything that was going to antagonize the jury and he didn't." (Tr. 10/9/02, p. 74-75).

The trial court's ruling is correct. Michigan has never voided the type of high/low agreement that Plaintiffs and #3607 agreed to here. The controlling authority from the Michigan Supreme Court for 20 years, *Brewer v. Payless Stations, Inc., 412 Mich. 673 (1982)*, holds unanimously that:

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When there is no genuine dispute regarding either the existence or a release or a settlement between plaintiffs and co-defendant or the amount to be deducted, **the jury shall not be informed of the existence of a settlement or the amount paid, unless the parties stipulate otherwise**. Following the jury verdict, upon motion of the defendant, the court shall make the necessary calculation and find the amount by which the jury verdict will be reduced. 412 Mich. at 679 **(emphasis added)**.

Recently, this Court, remanding to the Court of Appeals, in *Vanatta v. Paolucci, 464 Mich. 876 (2001),* acknowledged that *Brewer* is still the law in Michigan.

A. The High/Low Was Not a Mary Carter Agreement and the Trial Court Properly Refused to Disclose It to the Jury.

In *Rogers v. Detroit, 457 Mich. 125, 150, n22 (1998)*, this Court explained that a "Mary Carter Agreement" is one between plaintiff and some, but fewer than all defendants whereby the parties place limitations on the financial responsibilities of the agreeing defendants. The extent of responsibility is usually in inverse ratio to the amount the plaintiff is able to recover against the non-agreeing defendant or defendants." The *Rogers* Court went on to state that in some states, such agreements are void as against public policy and, in others they are permissible if disclosed to the jury. Michigan has never declared such agreements void or required jury disclosure.

The *Rogers* Court also quoted from *Smith v. Childs, 198 Mich. App. 94, 97-98 (1993)*:

> The distinguishing characteristics of a Mary Carter agreement are that it (1) not act as a release, so the agreeing defendant remains in the case, (2) is structured in a way that it caps the agreeing defendant's potential liability and gives that defendant an incentive to assist the plaintiff's case against the other defendants, and (3) is kept secret from the other parties and the trier of fact, causing all to misunderstand the agreeing defendant's motives.

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Here, the high/low agreement was not a Mary Carter agreement. It did not rob the Howell Aerie of its incentive to defend. In response to the Grand Aerie's mid-trial claim that #3607's attorney was not putting up a damages defense, Judge Burress aptly remarked to Mr. Cothorn, "My observation is that you haven't asked many more questions that he has" (Tr. 11/13/01, p. 198). As Mr. Cheatham put it, "If I wanted to help Mr. Fieger I would have taken the last witness on the stand and taken her apart and the jury would have been so mad at me it probably would have increased the verdict substantially . . . I have no incentive to help him at all in this case" (Tr. 11/13/01, p. 198-199). Thus, the mischaracterization on appeal of Mr. Cheatham sitting at trial "as a hang-dog, brooding, guilty-looking and completely silent Defendant," is appellate sophistry at its worst.

In *Rogers*, the Court went on to cite dicta from *Smith* that, some states [citing to the Florida case, *Ward v. Ochoa, 284 So. 2d 385, 387 (Fla. 1973)*] hold that "such agreements deny the non-agreeing defendants a fair trial. But neither *Rogers* nor *Smith* declared that the agreements in those two cases were illegal. No other Michigan decision has done so either.

In the face of the Grand Aerie's irrelevant string citations to authorities from other states regarding the evils of such "Mary Carter" agreements, Plaintiffs simply point out that the *Brewer* Court considered these arguments and found **"little cause to burden the jury with the added duty of calculating a liquidated settlement into its deliberations."** *412 Mich. 667-679.* (**emphasis added**). The "high-low" in this case is not even a "liquidated settlement".

Moreover, despite the Grand Aerie's efforts to make it appear so, it is far from a universal rule in other jurisdictions that juries are always to be instructed on such agreements. In some of the very cases Defendants cites, the appellate court found no prejudicial error in the trial court's failure to instruct the jury about the agreement. Those cases hold that disclosing such an agreement to the jury rests

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in the sound discretion of the trial court. See, e.g., *Sequoia Mfg. Co. v. Halec Const. Co., Inc., 570 P2d 782, 795 (Az. App. 1977)*, cited with approval in *Taylor v. DiRico, 606 P2d 3, 5 (Az. 1980)* [sufficient that agreement was made known to trial court and non-agreeing counsel as soon as possible after agreement reached]; *Reager v. Anderson, 371 SE2d 619, 630 (W. Va. 1988)* [disclosure to jury of general nature of "Mary Carter" settlement agreement not required in each case, but lies in sound discretion of trial court, defendant must make a particularized showing of prejudice]; *Slusher v. Ospital, 777 P2d 437, 442 (Utah 1989)* [finding two problems with disclosure–jury may infer that settling defendant must be main culprit or he would not have settled or infer that settling defendant is conciliatory and responsible but non-settling defendant is recalcitrant and irresponsible]. Clearly, even in those states that, unlike Michigan, do not forbid disclosure, the issue of disclosure is case specific and clearly resides in the sound discretion of trial court.

In short, the record here establishes that, as the trial court recognized, the Howell Aerie's defense of this case did nothing to prejudice the Grand Aerie. If the Grand Aerie is really so aggrieved by the high/low agreement, it should seek relief from our law-giver, the Legislature, not ask this Court to judicially legislate Michigan's public policy. The Application should be denied.

IV. THE CLAIM THAT THE HIGH/LOW AGREEMENT WITH HOWELL #3607 CAPPED THE GRAND AERIE'S DAMAGES IS UNPRESERVED; MOREOVER, THE GRAND AERIE'S LIABILITY WAS NOT JUST DERIVATIVE FROM THE LOCAL AERIE.

The Court of Appeals correctly rejected the Grand Aerie's claim that Plaintiffs' agreement with Howell #3607 should have limited the Grand Aerie's liability. (Exhibit 41; Majority Opinion, p. 6). As the majority recognized, Plaintiffs alleged both direct and vicarious liability claims against the Grand Aerie. Moreover, during the trial, as opposed to the post-judgment proceedings, the

Grand Aerie never raised the agreement with #3607 as a release or asserted that it was collateral estoppel or res judicata to continuing to proceed again the Grand Aerie.

A. This Issue Was Not Preserved During Trial.

Appellate defense counsel conceded in open court during argument on post-trial motions that the Grand Aerie did not preserve this issue at trial:

> "The fact is there were, there were actual or de facto court orders here that had legal effect that frankly the trial lawyers forgot about." (Tr. 7/24/02, p. 79).

This issue is not preserved for appeal. *Ohio Farmers Ins. Co. v. Shamie, 235 Mich. App. 417, 426-427 (1999); Michigan Up and Out of Poverty Now Coalition v. Michigan, 210 Mich. App. 162, 168 (1995); Morgan v. Engles, 13 Mich. App. 656, 661 (1968)* [defendant may not wait to see if verdict be favorable and then if not, raise question for first time post trial]. Accordingly this issue is unreviewable.

B. As the Court of Appeals Recognized, Plaintiffs' Amended Complaint Count I Against the Grand Aerie Asserted Direct Liability As Well As Vicarious Liability.

When the Grand Aerie first raised this issue by way of post-trial motion, Plaintiffs vigorously argued that collateral estoppel could not apply because there was no consent judgment against the Howell Aerie. (Tr. 10/9/02, p. 34-37). No release was ever given to anyone. (Tr. 7/24/02, p. 70). It was not a settlement, but rather a high/low agreement. If high/low agreements in multiple party cases were forbidden, then a co-defendant could never settle. (Tr. 7/24/02, p. 72). An agent is entitled to buy its peace without preventing the plaintiff from collecting from the principal. There is simply no relevant case law support for Defendant's argument to the contrary.

Rzepka v. Michael, 171 Mich. App. 748 (1988), relied on by Defendant, involved the actual release of a corporation where the only claim against is employees was derivative liability. Here, by contrast, there was no release or consent judgment and more importantly there were direct allegations of liability against the Grand Aerie which of course was, in any event, defaulted as to liability. (Exhibit 7, Amended Complaint, County I, p. 5-6; Tr. 10/9/02, p. 35-37). *Rzepka* does not advance Defendant's claim here. Similarly, *Larkin v. Otsego Hospital, 207 Mich. App. 391 (1995)* also dealt only with issues of vicarious liability between a doctor and a hospital. *Larkin* has nothing to do with this case and this issue which is manufactured out of whole cloth by appellate defense counsel is not remotely leaveworthy.

V. THE COURT OF APPEALS PROPERLY AFFIRMED DENIAL OF NEW TRIAL/REMITTITUR AND THE DENIAL OF A $300,000 SETOFF.

A. Standard of Review

MCR 2.611(E)(1), requires the trial court to exercise its discretion and order remittitur if the verdict is "excessive," i.e., if the amount awarded is greater than "the highest amount the evidence will support." But, when the award falls reasonably within the range of the evidence and within limits of what reasonable minds would deem just compensation for the injury sustained, the award will not be disturbed. The Court should not remit this verdict. (Exhibit 13, Verdict Form).

Under the court rule and *Palenkas v. Beaumont Hospital, 432 Mich. 527, 532 (1989)*, the trial court must use objective considerations relating to the conduct of the trial itself and the evidence adduced when ruling on a motion for remittitur. The *Palenkas* court suggested that trial courts should use three factors to determine whether the jury verdict was for an amount greater than the evidence supports:

(1) whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact;

(2) whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained; and

(3) whether the amount awarded is comparable to award in similar cases within the state and other jurisdictions.

Denying remittitur, Judge Burress said:

> This is not a county that's known for runaway verdicts. It is probably one of the most conservative in the state.
>
> But, I have said more than once if you present the right case to a Livingston County jury they would make the right awards.
>
> Was the verdict within the limits of what reasonable minds would deem just compensation for the injuries sustained. In this case, the death and the conscious pain and suffering. I say yes. And whether the amount awarded is comparable to awards in similar cases within the state and other jurisdictions, the two of you have varying opinions on that subject matter.
>
> But, I'm satisfied that when I take all of the materials and briefs that you have put together and all the evidence that you have gathered and put together, that the answer to that is also yes and I'll deny the motion for remittitur. Thank you. (Tr. 10/9/02, p. 80-81).

Review of the trial court's decision on a remittitur motion is for an abuse of discretion. See *Anton v. State Farm Mutual Auto Ins. Co., 238 Mich. App. 673 (1999)* ["This court must afford due deference to the trial court's unique ability to evaluate the jury's reaction to the evidence"]. The trial court here did not abuse its discretion.

B. The Trial Court Correctly Held That the Verdict Was "Within the Limits of What Reasonable Minds Would Deem Just Compensation for Injuries Sustained," And Not the Product of Passion or Sympathy.

Defendant nakedly maligns the verdict as not based on the evidence, "a

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sympathy verdict, illegally excessive, well beyond any evidence or proofs. . . ." But, it offers no objective support for the accusation that the verdict was the product of passion and prejudice. Here, as in *Phillips v. Deihm, 213 Mich. App. 389, 404 (1995)*, other than complaining of the size of the verdict, Defendant has presented no argument that the verdict was influenced by prejudice. The grant of remittitur is improper when it is not shown that the verdict was influenced by passion or prejudice or was contrary to law. *Soave Const. Co. v. Lind Asphalt Paving Co., 56 Mich. App. 202 (1975)*. The trial court was "on the scene" and discerned no impropriety. Defendant's bold allegations of a "runaway" jury are unsustainable. This verdict clearly satisfies the first *Palenkas* test.

Defendant also asserts that the evidence does not support the size of the verdict. But, even under *Palenkas*, the jury's award of damages especially for non-economic elements such as pain and suffering is to be given great deference. Under Michigan law, the trial court's remittitur power is to be exercised with restraint. *Jones v. Sanilac County Road Commission, 128 Mich. App. 569, 592 (1983)*. In *Davis v. Detroit, 149 Mich. App. 249, 267 (1986)*, this Court counseled:

> There is no exact mathematical formula which would allow a jury or court to precisely determine what amount would adequately compensate a party for the loss of society and companionship and pain and suffering due to the death of a close family member. As a result, it is generally recognized that such determinations should be left to the jury and a reviewing court should not arbitrarily substitute its judgment for that of the factfinder, unless clear error appears in the record.

See also MCivJI 50.01 ["The amount of money to be awarded for certain of these elements of damage cannot be proved in a precise dollar amount. The law leaves such amount to your sound judgment"].

As stated in *Sebring v. Mawbey, 251 Mich. 628, 629 (1930)*, "The law furnishes no exact rule by which damages for pain and suffering can be measured. Their determination must be necessarily be left to the good sense and

sound judgment of the jury in their view of the evidence." See also *Cleven v. Griffin, 298 Mich. 139, 141 (1941)*. It is solely within the discretion of the trier of fact to determine the amount of damages recoverable for pain and suffering. *O'Grady v. Rydman, 347 Mich. 606 (1957)*.

Nonetheless, Defendant complains that there is no proof that Kegan McClelland sustained $3 million in conscious pain and suffering. But, in *Byrne v. Schneider's Iron and Metal, Inc., 190 Mich. App. 176 (1991)*, a pathologist's testimony about how an 8 year old suffocated when his breathing passages were obstructed by sand, allowed the jury in infer conscious pain and suffering from this evidence. See also *Jenkins v. Raleigh Trucking Services, Inc., 187 Mich. App. 424 (1991)* [upholding award for conscious pain and suffering where evidence showed decedent did not die instantly but lay in his truck calling for held as he gradually suffocated]; *Meek v. Dept. of Transportation, 240 Mich. App. 105, 121, 122 (2000)* [existence of pain and suffering may be inferred from other evidence that does not explicitly establish the fact].

Here, pathologist, Dr. Bader Cassin testified that Kegan would have necessarily suffered greatly. He described panic, shock, struggle and fear. He said Kegan would have remained conscious for several minutes while he struggled in the human urine and excrement (Tr. 11/13/01, p. 126-129).

Anne Busby, the EMT, cried as she described how Kegan's head had gone into the contents of the bottom of the septic tank and the urine and excrement she found in his mouth, throat, lungs, eyes, ears and nose. She said every time she tried to resuscitate him the excrement came out of his mouth (Tr. 11/7/01, p. 180). She tried to wipe it from his face and eyes, but could not. Plaintiffs' proofs in this case amply support the jury's pain and suffering determination.

Nor is the $1 million for the past loss of love, society and companionship and $1 million for future loss of love, society and companionship unreasonable

when it is properly understood that the latter item also includes loss of earning capacity and loss of services. *Thompson v. Ogemaw County Board of Road Commissioners, 357 Mich. 482 (1959).*

Factually, the trial testimony and the numerous photographs established that Kegan's father, Mike, a young man himself, was very close to Kegan, his only child (Tr. 11/13/01, p. 238-251). Similarly, Kegan was Lacy's only child. Lacy tried, but was unable to, testify (Tr. 11/14/01, p. 34-35).

Other family members and witnesses specifically described her closeness with young Kegan. All four of Kegan's grandparents survived him. They regularly "baby-sat" Kegan and their close relationship with the boy was well documented in the record (Tr. 11/13/01, Testimony of Jackie Reed, p. 144-174; Rhonda Harter, p. 175-191; Linda Cox, p. 220-230; Stacy Bell, p. 231-237). The past and future lost love, society and companionship award is well-supported by the proofs.

Moreover, it is clear that Lacy Harter's economic and non-economic damages were not excessive either. Under *Gustafson v. Faris, 67 Mich. App. 363 (1976)* and *Perlmutter v. Whitney, 60 Mich. App. 268 (1975)*, Lacy Harter clearly had a direct cause of action for negligent infliction of emotional distress. And, it cannot fairly be doubted that the mental injury sustained from the contemporaneous shock of the death of Kegan has caused and will continue to cause Lacy on-going expenses for psychological care, treatment and services and has rendered her unemployable.

Lacy's family doctor (Samuel Vaisuz, Tr. 11/13/01, p. 206-219), her psychiatrist (Etienne DeHoorne, Tr. 11/13/01, p. 42-101) and the psychologist, (Beverly Bennett Tr. 11/13/01, pg. 92-171), all agreed that she is unable to work. Lacy has tried to commit suicide, she is an emotional wreck and her prognosis remains poor. She will likely need medication and continued psychiatric treatment for the rest of her life. Her depression will make future relationships difficult for the

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rest of her life (Tr. 11/13/01, p. 67, 83-87). The jury's damage award to Lacy Harter is not excessive.

Plaintiffs remind the Court that there is no marketplace price for human life, nor any precise formula for determining wrongful death damages. *Kirk v. Ford Motor Co., 147 Mich. App. 337, 347 (1985).* Here, Kegan died as a toddler, when the parent-child relationship is one of complete dependence with only limited verbal communication from him. A couple years later, his loved ones could have experienced the joys of him starting school and his ability to express love, appreciation, and affection to them. Later, his parents could expect career achievements, grandchildren, a mature parent-child relationship between two loving adults, and to perhaps themselves be cared for by Kegan as they aged. In short, good loving family relationships intensify with time, and the quality of what has been lost increases as well. At bottom, just compensation for Kegan's death is a matter upon which reasonable minds may differ. This Court should respect the constitutional factfinder, the jury, in the inexact comparison of human loss with mere money.

C. The Verdict Is Well Within Awards in Comparable Cases from Michigan and Other Jurisdictions.

Defendant points to different verdicts, of different juries, for the different losses of different plaintiffs, in different cases, implying that there is a marketplace that establishes the value of a child's life. There are several flaws with this approach.

While "comparable verdicts" were noted in *Palenkas* as one consideration that led the Court to conclude that there had been no abuse of discretion in the remittitur ruling in that case, the *Palenkas* court also expressly recognized that, "this court may not substitute its judgment on damages for that of the jury" and that "a comparison [with other verdicts] cannot serve as an exact indicator." *432*

Mich. at 538. Palenkas does not create as a remittitur standard in one case, the verdicts in other, necessarily unique, cases. Indeed, as the authors of *Dean and Longhofer, Michigan Court Rules Practice*, Rule 2.611(§2611.12, p. 416-517), caution, "The variables influencing the amount of even a single jury verdict are too numerous and complex to say, with any significant degree of reliability or validity, that jury awards in two cases should be similar."

Moreover, Defendants' emphasis on the "death of a young child" suggests that the lives of toddlers are legally viewed as insignificant, or at least relatively so. That claimed disrespect for the lives of young children is of dubious current validity in the wake of *Taylor v. Kurapati, 236 Mich. App. 315 (1999)*. In Taylor, the Court described young children, even those with severe birth defects, as "providing benefits to the parents of the life of that child" that are "unquantifiable" (*236 Mich. App. at 349*). The law does not support Defendant's contention that its money (more accurately, its insurers') is inherently more valuable than the life of toddlers in general or Kegan McClelland, in particular.

Contrary to Defendant's argument, logically, the deaths of the youngest should yield the highest non-economic damages awards. If, for example, one assumes an 80 year life expectancy, a person who dies at age 40 has given his loved ones 40 years of society and companionship, and they have lost 40 years of society and companionship because of his death. When the life of a two year old has been taken, the heirs have enjoyed but two years of society and companionship; and have been deprived of 78 years–about double that of the 40 year old's death. Moreover, the incremental 38 years are those occurring in the future–say year 2040 to 2079–where inflationary considerations increase the number of dollars required to provide a constant purchasing power measure of recovery. Thus, giving the tortfeasor the benefit of ignoring later year inflation, and assuming the same number of heirs entitled to recover, a $4,000,000 non-

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economic award for the death of a 40 year old, a $2,000,000 non-economic award for the death of a 60 year old, a $7,800,000 non-economic award for the death of a two year old, and a $6,000,000 non-economic award for the death of a 20 year old are all "comparable", i.e., $100,000 per year on average for the collective losses of all heirs. It is therefore fallacious to limit the consideration to "toddlers", or to assume that the compensation for the death of a toddler must be less than that for one who is older.

In all events, even if "comparable" verdicts were the primary gauge, and even if other cases were truly "comparable", then the verdict in this case is within the range of what reasonable jurors could find appropriate. This is particularly so when the future damages are assessed in light of the number of years of future loss (about 75) and heirs, and past awards are adjusted for the diminished purchasing power of today's dollar compared with that of 10 or 20 years ago.[5]

Defendant compares the $7.8 million awarded by this jury to cases like *Burns v. Consumers Power, 1990 WL 367333 (Nov. 1990)*, a carbon monoxide infant death case with a purported $1.25 million award (these Westlaw reported verdicts at pp. 45-46, n. 10 of the Grand Aerie's brief are not attached to the brief, and Plaintiffs have not verified them) and to a $1.5 million award in *Walker v. Hurley Medical Center, 1985 WL 351669*. But, using a conservative investment approach, the value of these awards are doubled every 10 years and the *Burns* award would now be worth about $2.75 million and the *Walker* award about $4.2 million. These awards are of course at the low end, and do not represent MCR 2.611(E)(1) and *Palenkas* **highest amount** the comparable cases will support.

The verdict here is in fact consistent with Michigan wrongful death awards after inflationary adjustment. See, e.g., *Kirk v. Ford Motor Co., 147 Mich. App.*

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[5]See e.g., *Hyundai Motor Co. v. Ferayorni, 842 So. 2d 905, 909, (Fla. App. 2003)*(Exhibit 39) [recognizing that wrongful death verdicts in cases decided more than five years earlier are of limited value].

337, 346-347 (1985) [$3.4 million damage award, now over $10 million when adjusted for inflation, in non-economic damages for death of 19 year old, with 17 less years of losses than here]; *May v. Grosse Pointe Park, 122 Mich. App. 295 (1982)* [$1.145 million for 1975 death of 15 year old run over by garbage truck, 27 years of inflation gives something in the range of $5.5 million]; *Klinke v. Mitsubishi Motors, 219 Mich. App. 500, 516 (1996) aff'd 458 Mich. 582 (1998)* [denying remittitur on $5 million non-economic award for death of 22 year old]; *Phillips v. Mazda Motor Mfg., 204 Mich. App. 401, 416-417 (1994)* [upholding $3.3 million verdict to parents of 22 year old son who died after 30 minutes of pre-death suffering]. Similarly, *Shepard v. Redford Community Hospital, 151 Mich. App. 242 (1986)*, that case involving the death of a five year old on remand, was settled in 1989 for $4.15 million which is the approximate equivalent of $9.545 million in 2002 dollars. Defendant also ignores the 1999 Wayne County verdict in *Phillips v. Mercy Health Center, 14 ATLA PNLR (Feb. 1999)*, (Exhibit 14) for $7.17 million for a severely brain-damaged baby who survived for seven months following birth trauma malpractice. See also *Stotlar v. Armbruster, Washtenaw County No. 00-690-NO (2001)* (Exhibit 15) [$6.5 million for a 6 year old girl run over by a school bus]. Most recently, the Court of Appeals affirmed a $7 million verdict with 25% reduction for comparative negligence in a vehicular/pedestrian wrongful death of a 39 year old woman. *May v. City of Detroit, Court of Appeals Nos. 233318, 234966 (unpubl. rel'd 6/12/03).*

Moreover, these Michigan awards are consistent with modern death awards for children around the country. See, e.g., *Jones v. Chicago Osteopathic Hospital, 738 NE2d 542 (Ill. App. 2000)* [$6.3 million for birth trauma death of 18 month old] (Exhibit 16); *Horta v. Arrow Truck Leasing, 42 ATLA L. Rep. 46 (March 1999)* [California–$5 million jury verdict in auto death of 9 year old] (Exhibit 17); *MacFarland v. State of Washington, 41 ATLA L. Rep. 209 (April 1998)* [$6.28

million against state for negligent supervision of ex-con who stabbed 17 year old to death] (Exhibit 18); *Socorso v. Village of Buffalo Grove, 39 ATLA L. Rep. (Oct. 1996)* [Illinois–$3.9 million verdict, 10 year old fell into open access hole into underground water reservoir and drowned] (Exhibit 19); *Call v. Heard, 925 SW2d 840 (Mo. 1996)* [$5 million for minor female] (Exhibit 20); *Martin v. Coastal Mart, Inc., 38 ATLA L. Rep. 383 (1996)* [Florida–$7 million in death of 2 year old in vehicle at gas station for parents' emotional distress when vehicle struck by another car and propelled into gas pump starting fire] (Exhibit 21); *Lance, Inc., v. Ramanauska, 731 So. 2d 1204 (Ala. 1999)* [$10 million from other settling defendants plus $4 million after remittitur for 10 year old electrocuted by ungrounded vending machine] (Exhibit 22); *Kea v. Mathews, 970 P. 2d 434 (Az. App. 1998)* [$3.75 million for each parent not excessive for child's vehicular accident death] (Exhibit 23); *Wightman v. ConRail Corp., 715 NE2d 546 (Ohio 1999)* [verdict remitted to $5 million in punitive damages for 16 year old's death at rail crossing when struck by speeding train] (Exhibit 24); *Scott v. Porter, 530 SE2d 389 (SC App. 2000)* [$5.6 million in medical malpractice death of 19 month old child] (Exhibit 25); *Hurd v. United States, 134 F. Supp. 2d 745 (D.S.C. 2001), aff'd 2002 U.S. App. Lexis 7609 (4th Cir. 2002)* [$6 million each against Coast Guard drowning death of three teenagers for negligent failure to rescue] (Exhibit 26); *Sayles v. Vancom, Inc., 40 ATLA L. Rep. (1997)* [Missouri–$14 million settlement for death of 14 year old when toggle on jacket drawstring caught on bus as student exited] (Exhibit 27); *Fitch v. Mountain Enterprises, Inc., 99-C-86 Lincoln Court W. Va. (6/27/01)* [$18 million in wrongful death of two minor siblings in head-on collision] (Exhibit 28); *Steinke v. Player, 145 F. 3d 1325, 1998 U.S. App. Lexis 9512 (4th Cir. 1998)* [South Carolina verdict remitted to $6 million in 17 year old's bungee jumping death] (Exhibit 29); *Johnson v. City of Allandale, 40 ATLA L. Rep. 337 (Nov. 1997)* [Florida $17.5 million verdict in drowning death of 5 year old

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at City day camp outing] (Exhibit 30); *Runnels v. Catholic Charities, 13 ATLA PNLR (Nov. 1998)* [Texas $7.93 million for fatal injury to 2 year old at daycare center] (Exhibit 31); *Iracheta v. General Motors Corp., 2002 Texas App. LEXIS 3859 (2002)* [$10.75 million for death of 9 year old in products liability claim where vehicle collided with tractor-trailer then caught fire] (Exhibit 32); *Foster v. Catalina Industries, Inc., 55 SW3d 385 (Mo. App. 2001)* [$15 million where 4 year old electrocuted by energized base of defective halogen lamp] (Exhibit 33); *Hallowell v. University of Chicago Hospital, 15 ATLA PNLR 174 (Nov. 2000)* [Illinois–$8 million in cardiac arrest death of 9 year old] (Exhibit 34); *Gentry v. Volkswagon A.G., 2002 Ga. App. LEXIS 424 (3/28/02)* [$11 million award affirmed in seatbelt product liability death of 16 year old] (Exhibit 35); *Mason v. Ford Motor Co., 20 ATLA PLLR 9 (Feb. 2001)* [$9 million for death of 11 year old in SUV fire following collision] (Exhibit 36); *Hyundai Motor Co. v. Ferayorni, 842 So. 2d 905 (Fla. App. 2003)* [reversing remittitur and affirming $6.5 million verdict in vehicular death of 17 year old girl]; (Exhibit 39); *GM v. McGee, 867 So. 2d 1244 (Fla. App. 2004)* [affirming $33 million verdict for gas tank explosion, 13 year old killed, 3 other family members severely burned](Exhibit 40).

Based on these modern death awards for minors around the country, the verdict in this case is clearly within the "comparable" range. Even under the "market price of dead babies" approach advocated by Defendant, the verdict is consistent with modern awards in comparable cases. The Court of Appeals did not err in finding that Judge Burress correctly denied Defendant's motion for remittitur.

D. Defendant Is Not Entitled to a Credit for the Settlement with Howell Aerie #3607.

The trial court entered the judgment jointly and severally (Exhibit 37: Judgment; Tr. 3/1/02, p. 60). The Grand Aerie asserts that, based on *Markley v.*

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Oak Health Care Investors, *255 Mich. App. 241, 255 (2003)*, it is entitled to a $300,000 setoff from the verdict for the settlement amount paid by Howell Aerie #3607. But, as the Court of Appeals explained in note 5, "a severally liable, non-settling tortfeasor cannot seek the benefit of a setoff because the settling tortfeasor made payment attributed only to its own assessment of fault."

Further, as the majority recognized at the Court of Appeals, "As Defendant was also defaulted on the issue of direct liability, we find that the judgment against Defendant was appropriate" (Exhibit 41, Slip Opinion, p. 6). The lower courts correctly determined that the Grand Aerie was not entitled to a $300,000 offset for the amount paid by Howell Aerie #3607.

VI. THE COURT OF APPEALS CORRECTLY RECOGNIZED THAT THE GRAND AERIE FAILED TO PRESERVE ITS OBJECTION TO CLOSING ARGUMENT AND "FAILED TO SHOW THAT THE POEM CAUSED ERROR REQUIRING REVERSAL."

Shamelessly seizing the opportunity to remind this Court yet again who Plaintiffs' lead attorney is, the Grand Aerie's attorney incants his name another nine (9) times in this meritless argument. Strangely, Appellant's attorney fails to apprise this Court that this issue is totally unpreserved.

Plaintiffs' counsel's recitation of the eight paragraph "poem", "To Remember Me", during closing argument (Tr. 11/14/01, p. 86-87), was never objected to by trial defense counsel John Cothorn. In fact, Mr. Cothorn's first remark to the jury when his turn for closing argument came, was not an objection, but praise for Mr. Fieger:

> "Thanks, Judge. Tough case, **Mr. Fieger's a damn good lawyer**." (Tr. 11/14/01, p. 102, emphasis added).

Further, no one thought the closing argument was objectionable in any way during the year of post-trial proceedings, and no post-trial objection was heard until appellate defense counsel asserted it for the first time at the Court of Appeals

as a motion to remand filed one week before he filed Defendant's brief on appeal. The motion was denied then and, as the majority[6] stated in its opinion, "We note that Defendant failed to object on this ground at trial and failed to show that the poem caused error requiring reversal for a new trial for damages" (Exhibit 41; Slip Opinion, p. 7).

Analyzing the harmless error rule in a criminal context, this Court has noted that courts have long recognized the importance of preserving issues for appellate review. *People v. Grant, 445 Mich. 535 (1994).* The Court stated that, as a general rule, issues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances. See also, *People v. Hernandez, 443 Mich. 1 (1993)*, [post-judgment motion to remand that challenges issues not raised at trial permitted only if objection could not be raised contemporaneously]. Under Michigan law, plain unpreserved error may not be considered for the first time on appeal unless the error could have been decisive of the outcome or it falls under the very narrow category of cases in which prejudice is presumed or reversal is automatic. Asserted for the first time on appeal, this closing argument "error" satisfies neither criteria. The Court of Appeals properly concluded that this issue was waived.

Even if this Court addresses the merits of Defendant's challenge, it is clear that the argument does not evince a deliberate course of conduct aimed at preventing a fair and impartial trial or a studied purpose to inflame or prejudice the jury or deflect its attention from the lost society and companionship issue involved. *Ellsworth v. Hotel Corp. of America, 236 Mich. App. 185, 191-192 (1999), lv. den. 461 Mich. 997 (2000), citing Hunt v. Freeman, 217 Mich. App. 92, 95 (1996).* Factually, in the specific context of this case, this closing argument was not inflammatory, nor in this context did "To Remember Me" have anything

[6]Judge O'Connell's dissent was silent on this issue.

whatsoever to do with organ donation. The poem is about removing the prejudices of mankind, and about selflessness.

It is true that, **under distinctly different circumstances**, Plaintiffs' counsel recited essentially the same passage at trial in *Porter v. Northeast Guidance Center, 2001 WL 1179672, 2001 Mich. App. LEXIS 2010 (unpublished rel'd 10/5/01)*. But, **in *Porter*, defendants timely objected** twice when the trial court admitted "testimony from the decedent's mother, sister and grandmother regarding the fact that the decedent child's organs were donated to give (sic: five?) different people." *Porter*, (Murphy J. dissenting at *6). The majority in *Porter* said that "any argument that a discussion of organ donations was not for the purpose of inflaming the passions of the jury" was laid to rest by the recitation of the essay.

The crux of the majority's ruling in *Porter* was an evidentiary one, holding that the admission of evidence regarding organ donation was irrelevant. The majority merely held that it was prejudicial to have proffered testimony concerning donation of the child's organs. In *Porter*, no one including the Appellant, and certainly not the Court of Appeals, claimed that the poem was *ipso facto* improper.

In the present case, by contrast to *Porter*, trial defense counsel never objected to the poem, and the undeniable fact is that there was no testimony whatsoever in this case about organ donation because Kegan's organs were not donated. Instead, fairly analyzed, **in the context of this specific closing argument**, this reference is about Kegan's mother, Lacy Harter's and his father, Mike McClelland's lost love, society and companionship for Kegan.

The eulogy is about what Lacy Harter and Mike McClelland would have enjoyed as the essence of Kegan if he was still with them. Specifically, it is about the destruction of the family relationship and about how any person's death, on the one hand, diminishes us all, but how, on the other hand, every person who

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dies leaves indelible memories on those still living. What "To Remember Me" does is to focus the jury's damages analysis upon the quality of the relationship that Kegan shared with his survivors. At its core, the poem manifests the positive elements of Kegan's life that can no longer be enjoyed with him by his survivors. Clearly, it is not in the context of this case about engendering sympathy for organ donation.

Reading the poem in the context of the entire closing argument, it does not exceed permissible grounds. Reciting, "To Remember Me" is no different than asserting "the worthlessness of a million dollars on a bed of pain" in *Ehlers v. Barbeau, 291 Mich. 528, 533 (1939)*. Nor is it any different from plaintiff's counsel's liberal quotation from the Bible in *Elliot v. A.J. Smith Contracting Co., 358 Mich. 398, 407 (1960)*, a child "dart out" wrongful death case:

> . . ."'And whoso ever receiveth one of these little children in My name, receiveth Me; and whosoever offendeth against one of these, My little children, it is better for him that he would have a millstone cast about his neck and that he were drowned in the depths of the sea'"; and concluded by stating:
>
> "And then finally, when comes down to the aspirations that we all hold for the better and bigger things in life, and all week long you are going to hear from the churches throughout the nation, throughout the Christendom, you are going to hear the message of the value of One Life, and, come Friday, all you have to do is look on the walls of this building, and you will see that 'We will close from 12 o'clock to 3 to Friday,' Good Friday. Why? The value of life, and the value of That Life there has made our lives better for 2,000 years; and I say to you that when our churches say to us, as they do so quite correctly and honestly, to evaluate and express your love and devotion in terms of the generosity of your gift, and the helping to build these temples to God Almighty, and the temples of healing in the forms of our hospitals, and so forth, they are in effect saying to you 'Equate it in terms of money.'
>
> * * *
>
> "Believe me, you will make every road safer, and every highway safer if you thunder forth your verdict, 'We find for the plaintiff, and the damages are as asked for, $50,000.'"

Similarly in Riordan v. Gould, *74 Mich. App. 292, 295-296, n1 (1977)*, the Court found that defendant was not entitled to a mistrial in a wrongful death sewer excavation cave-in where plaintiff's counsel asserted in closing argument, "There probably can't be anything more horrible than being buried alive." The Court of Appeals also criticized the fact that defendant had only belatedly objected to the statement after closing arguments had been completed and after jury had been instructed. Here, there was no objection at all, not even during the 17 months of post-trial proceedings which appellate defense counsel who now raises the issue was involved with from the start. (Exhibit 38, 12/5/01 Appearance of Attorney John Jacobs). Viewed in the proper context, this closing argument was permissible advocacy from an attorney that trial defense counsel openly praised to the jury as "a damn good lawyer."

Further, at both the impaneling of the jury (Tr. 11/5/01, p. 91), and again in instructing the jury after closing arguments (Tr. 11/14/01, p. 119), the trial judge reminded the jury pursuant to SJI2d 1.01(5)[now MCivJI 3.04], that the lawyer's statements are not evidence. Denying Defendant's new trial motion, Judge Burress aptly commented on the trial:

> This is a case that was well presented to the jury. The testimony, as I've indicated, is some of the most compelling that I have heard in the courtroom. I think that after the session was over and certain witnesses testified that there was not, as you say, a dry eye in the house including my own.
>
> **And I'm satisfied that the verdict in this case was not the result of any improper methods, prejudice, passion, partiality, sympathy, corruption or a mistake of law or fact. I'm satisfied that it was the facts presented ably that convinced the jury that they should render the award that they did.**
> (Tr. 10/9/02, p. 80, emphasis added).

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Here, Defendant's effort to take the fact-specific holding in *Porter*, a non-precedential, unpublished case which, by contrast, did involve irrelevant testimony about organ transplants from the decedent, and make it a "plain error" bar that automatically requires a new trial on liability and damages, amounts to grandstanding at Plaintiffs for their choice of counsel and to "grabbing at straws." The unobjected to closing argument in this case fell entirely within the bounds of propriety. The Court should deem the issue waived by Defendant's failure to object, but if the Court addresses the merits, Plaintiffs' closing argument affords the Grand Aerie no appellate parachute.

RELIEF REQUESTED

For all of the foregoing reasons, the Application for Leave to Appeal should be denied.

Respectfully submitted,

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